SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-563

LOCAL UNION NO. 11, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

vs.

GEORGE H. BOLDT as Chairman of the Pay Board; JOHN T. DUNLOP as Chairman of the Construction Industry Stabilization Committee; and LOS ANGELES COUNTY CHAPTER, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION,

Respondents.

Petition for a Writ of Certiorari to the United States Temporary Emergency Court of Appeals.

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
A. Preliminary Statement	2
B. Facts	3
1. The Parties	3
2. The Negotiations	3
3. Submission to the CISC	4
4. Proceedings Below	4
Reasons for Granting the Writ	5
1. Statement of the Issue	5
2. Constitutional Restrictions Upon CISC's Ruling	6
Conclusion	7

INDEX TO APPENDICES

Appendix A. Opinion of the Temporary Emergency Court of Appeals	App. p. 1
Appendix B. Fifth Amendment to United States Constitution	9
Appendix C. Economic Stabilization Act of 1970, Section 203	10

TABLE OF AUTHORITIES CITED

Cases	Page
Aris Gloves, Inc. v. United States, 420 F.2d 1386 (Ct. Cl. 1970)	6
Armstrong v. United States, 364 U.S. 40 (1960)	7
Johnson v. United States, 79 F. Supp. 208 (Ct. Cl. 1948)	6, 7
King v. United States, 427 F.2d 767 (Ct. Cl. 1970)	6
Lynch v. United States, 292 U.S. 571 (1934)	6
Regulations	
Federal Regulations, Title 36, Sec. 6339	3
Statutes	
Economic Stabilization Act of 1970, Sec. 203	2, 3
Economic Stabilization Act of 1970, Sec. 211(a)	4
Economic Stabilization Act of 1970, Sec. 211(g)	2
United States Code, Title 12, Sec. 1904	2
United States Constitution, Fifth Amendment	2, 6, 7

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Respondents.

Petition for a Writ of Certiorari to the United States Temporary Emergency Court of Appeals.

The petitioner, Local Union No. 11, International Brotherhood of Electrical Workers, AFL-CIO, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Temporary Emergency Court of Appeals entered in this proceeding on August 10, 1973.

OPINION BELOW.

The opinion of the Temporary Emergency Court of Appeals, not yet reported, is Appendix "A" hereof. No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION.

The judgment of the Temporary Emergency Court of Appeals was entered on August 10, 1973. Jurisdiction to review a judgment of that Court is conferred by § 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note.

QUESTION PRESENTED.

Whether the failure of the Construction Industry Stabilization Committee to approve the wage increase negotiated by the petitioner on behalf of persons the petitioner represents for purposes of collective bargaining, constitutes a taking of property without just compensation, in violation of the Fifth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fifth Amendment to the United States Constitution, and § 203 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904, note, are appended hereto as Appendices "B" and "C" respectively.

STATEMENT OF THE CASE.

A. Preliminary Statement.

The suit below arose under the Economic Stabilization Act of 1970, as amended ("the Act"), by Local Union No. 11, International Brotherhood of Electrical Workers, AFL-CIO ("the Union"), against the Pay Board and the Construction Industry Stabilization Committee ("CISC") through their respective chairmen, as well as against Los Angeles County Chapter, National Electrical Contractors Association ("NECA"). At issue was the question of whether the CISC properly, or in

the alternative, constitutionally, rejected a negotiated wage increase.

The CISC was established on March 29, by Executive Order 11588, 36 F.R. 6339, pursuant to the President's authority under § 203 of the Act. Included in the CISC's authority is the power to disapprove such wage increases which it finds to be unreasonably inconsistent with the purposes of the Act.

B. Facts.

1. The Parties.

The Union is the collective bargaining representative of approximately 6,000 electrical workers in and about Los Angeles, California [R 12 ¶ 1 "R" refers to Record on Appeal]. The NECA is the bargaining representative for approximately 200 of its members [R 13 ¶ 2]; and approximately 400 other companies which are not members of the NECA agree to be bound to the agreement reached between the NECA and the Union [R 13 ¶ 3].

2. The Negotiations.

Prior to the current collective bargaining agreement (the "Inside Wiremen's Agreement" or the "Agreement") between the Union and the NECA, the next previous agreement was for the period of June 1, 1969 to May 31, 1972 [R 13 ¶ 4]. On September 1, 1970 the parties reopened the 1969-1972 agreement, and entered into the current Inside Wiremen's Agreement [R 13 ¶ 6]. A copy of the 1969 to 1972 Agreement is in the Record at 18, and the 1970 to 1973 Agreement at 19.

The changes made between the two Agreements are underlined in the 1970 to 1973 Agreement, and

among the changes made were an increase in wages and benefits totaling $1.71 per hour to be effective June 1, 1972 [R 13 ¶ 7]. Additionally, one of the changes which benefited the contractors was contained in the transferring clause (Art. IV, ¶ 20 at 37 of 1970-73 Agreement, at R 19), which presently permits contractors to transfer any number of "shopman" employees to any job within the geographical jurisdiction of the Union (Los Angeles County). Under the expired Agreement, on the other hand, [R 18], contractors were greatly restricted in the transfer of workers.

3. Submission to the CISC.

The negotiated increase was submitted to the CISC during January of 1972 [R 13 ¶ 8]. By letters dated March 7, 1972 [R 20] and April 26, 1972 [R 21], the CISC ruled against permitting portions of the June 1, 1972 increase to go into effect.

The Union filed notice with the CISC on June 1, 1972, requesting that the ruling of April 26, 1972, be reconsidered. This request for a hearing to reconsider the ruling was granted by the CISC [R 14 ¶ 11]; a hearing on the request was held on July 27, 1972 [R 14 ¶ 13]; and on August 2, 1972, the CISC denied the request for reconsideration [R 14 ¶ 14].

4. Proceedings Below.

Following the denial by the CISC of the Union's negotiated wage increase, suit was instituted by the Union in the United States District Court for the Central District of California. That Court had jurisdiction pursuant to § 211(a) of the Act. The District Court denied the relief sought by the Union, and this denial was affirmed by the Temporary Emergency Court of Appeals.

Reasons for Granting the Writ.

To date, this Court has not had an opportunity to review either the constitutionality of the Act, or any rulings thereunder. The issue presented here in one which will affect most workers in the construction industry, and in particular, those workers whose wage increases have been reduced or eliminated by the CISC.

1. Statement of the Issue.

The Union's members in September 1970 gave up a precious non-economic item in return for wage increases, including the wage increase which the CISC has not yet approved. That non-economic item was the right to be employed near their home, and thus to avoid excessive travel, inconvenient hours of departing for work and arriving home, and added travel costs.

In not approving a substantial amount of the wage increase, the CISC has given to the contractors the benefit of *their* bargain, viz., the elimination from the Inside Wiremen's Agreement of the travel restrictions, while at the same time it has deprived the Union of the benefit of *its* bargain, viz., the wage increase.

Had the Union realized that it would not be able to put into effect the money offer made by the contractors in return for its release of the travel restrictions, presumably it would not have given up those restrictions. Yet now that it has bargained away those restrictions, the Government seeks to also deprive the Union of the quid pro quo which it thought it had received.

2. Constitutional Restrictions Upon CISC's Ruling.

The prohibition against the taking of private property for public use without just compensation is a guarantee contained in the Fifth Amendment to the United States Constitution. That Amendment refers not only to real property, but to personal property as well. *King v. United States,* 427 F.2d 767, 769 (Ct. Cl. 1970).

The government need not take possession of one's property in order to constitute a Fifth Amendment taking. A taking occurs when the government, by its actions, deprives the owner of his interest in his property. It also occurs when the government makes it possible for one individual to obtain the use or benefit of another's property. The controlling point is the loss to the owner, not accretion to the government. *Aris Gloves, Inc. v. United States,* 420 F.2d 1386, 1391 (Ct. Cl. 1970). Here, the government had permitted the contractors to take the transfer clause from the Union while at the same time the government takes from the Union the wage increases which induced it to forego the transfer clause. The government is thus permitting the NECA to have the use of the Union's property, viz., the transfer clause, without just compensation.

A contractual right is as much a property right as real property, and thus comes within the protection of the Fifth Amendment, *Lynch v. United States,* 292 U.S. 571, 579 (1934). An analogous case to the present one is *Johnson v. United States,* 79 F. Supp. 208 (Ct. Cl. 1948) (three-judge court), where a federal judge resigned after the passage of a statute providing a life salary to resigned federal judges. The judge had a contractual right to that salary, which was held

to be immune from subsequent governmental deprivation by the protection of the Fifth Amendment. 79 F. Supp. at 211.

The purpose of the Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation, was

> "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

The economy may not be stabilized at the Union's expense alone, by depriving the Union and its members of their property.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Temporary Emergency Court of Appeals.

Respectfully submitted,

JULIUS REICH,
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Counsel for Petitioner,

APPENDIX A.

Opinion of the Temporary Emergency Court of Appeals.

Temporary Emergency Court of Appeals of the United States.

No. 9-5.

Local Union No. 11, International Brotherhood of Electrical Workers, AFL-CIO, Appellant, v. George H. Boldt as Chairman of the Pay Board, John T. Dunlop, as Chairman of the Construction Industry Stabilization Committee, and Los Angeles County Chapter, National Electrical Contractors Association, Appellees.

Julius Reich, Los Angeles, California (Brundage, Neyhart, Miller, Reich & Pappy), for Appellants.

Paul T. Michael, Attorney, Department of Justice, Washington, D.C. (Harlington Wood, Jr., Asst. Attorney General, William D. Keller, United States Attorney, Matthew A. Schumacher, Asst. United States Attorney, with him on the brief) for the Government Appellee.

Kyle D. Brown, Los Angeles, California (Hill, Farrer & Burrill), for Appellee-National Electrical Contractors Association.

Before CARTER, CHRISTENSEN and VAN OOSTERHOUT, Judges.

VAN OOSTERHOUT, Judge.

This is a timely appeal by plaintiff, Local Union No. 11, International Brotherhood of Electrical Workers, AFL-CIO (Local 11) from final judgment of the District Court entered February 23, 1973, sustaining defendants' motion for summary judgment and declaring valid a final wage-increase determination of the Construction Industry Stabilization Committee (CISC).

The CISC determination approved payment of a wage increase of $1.00 per hour rather than the $1.71 per hour wage increase which was scheduled to be operative June 1, 1972, under the terms of the September 1, 1970 amendment to the Inside Wiremen's Agreement between Local 11 and the Los Angeles Chapter of the National Electrical Contractors Association (NECA). This court has jurisdiction under § 211(b)(2) of the Economic Stabilization Act of 1970 as amended, hereinafter referred to as the Act.

This suit was brought by Local 11 against the Pay Board, CISC and NECA. The issue was the question of whether CISC properly or, in the alternative, constitutionally rejected the negotiated wage increase of $1.71 per hour.

This court has heretofore determined in litigation between the parties that CISC had rendered a final decision that only $1.00 of the $1.71 wage increase contracted for was allowable and approved, and that the demand of Local 11 that the additional 71 cents not approved be placed in escrow was not permissible and constituted a violation of the Act. United States v. International Brotherhood of Electrical Workers, ... F.2d .... (TECA No. 9-2, 1973). Much of the background material and the pertinent law are there set out and will not be repeated here. The constitutional issues here raised were not reached in our prior decision.

Local 11 is the collective bargaining agent for approximately 6,000 electrical workers in the Los Angeles area. NECA is the bargaining representative of 200 of its member employers. Local 11 and NECA reopened their 1969-1972 collective bargaining contract and entered into a new agreement extending to 1973

on September 1, 1970. The principal changes made in the new agreement were an increase in wages and benefits of $1.71 an hour, effective June 1, 1972, and the liberalization of the right of NECA members to transfer employees to any job within Los Angeles County. Local 11 contends that the wage increase was the inducement for the transfer rights granted the employers. The amended contract is a comprehensive one dealing with the rights and responsibilities of the parties thereto and contains at Article VIII a separability clause which, subject to certain exceptions not here applicable, provides that if any portion of the agreement is declared void all other provisions of the agreement shall continue to be in full force and effect.

The negotiated wage increase was submitted as required by law to CISC. On April 26, 1972, CISC approved $1.00 of the $1.71 wage increase, denying the remaining 71 cents. Local 11, upon request, was granted a rehearing after which CISC adjered to its prior decision. Other facts will be developed to the extent necessary during the course of the opinion.

Local 11 in its present appeal urges that it is entitled to a reversal for the following reasons:

A. CISC disapproval of the wage increase negotiated by the Union is arbitrary, capricious, and in excess of the CISC's authority.

B. The failure to approve the Union's contract is unconstitutional.

   1. The failure to approve the Union's contract is a taking of property without just compensation, in violation of the Fifth Amendment.

* * *

2. The failure to approve the Union's contract which was made prior to March 29, 1971, while validating contractors' agreements made prior to March 29, 1971, is a denial of equal protection."

We reject each of such contentions for the reasons hereinafter stated and affirm the judgment.

We are satisfied that CISC acted within its jurisdiction in limiting the wage increase of Local 11 members to $1.00 an hour. Congress has declared the policy in § 202 of the Act that it was necessary to stabilize wages. In furtherance of that goal, Congress by § 203 delegated to the President authority to stabilize wages at not less than those prevailing on May 25, 1970. As this court noted in Plumbers Local Union No. 519 v. CISC, ... F.2d .... (TECA No. 5-3, 1973), CISC was created to effectuate the stabilization of wages and prices in the construction industry. The existence, function and authority of the CISC has been repeatedly reaffirmed by the President in the various phases of the construction programs. See United States v. International Brotherhood of Electrical Workers, supra.

CISC and the trial court had before it extensive charts showing, commencing in 1960, the wage and fringe benefits of Local 11 and other building and trade unions in the Los Angeles area and also the wage and fringe benefits of electrical unions throughout the State of Caliifornia. The trial court made appropriate and rational findings of fact and based thereon its conclusion of law, stating:

> "CISC's objective was to maintain the historical wage and fringe benefit relationship which had ex-

> isted between LOCAL 11 and other electrician unions and other building trades unions. In considering the rates of wage and fringe benefits of other electrician unions and other building trades unions, CISC approved a wage and fringe benefit increase for LOCAL 11 which reasonably reflected that historical relationship. The action of CISC was reasonable and had a rational basis."

Such conclusion is in accord with the applicable law and is based upon substantial evidence.

We now pass to the constitutional issues raised. Before reaching the specific points urged by Local 11, we observe the constitutionality of the Economic Stabilization Act of 1970 as amended and the executive orders and regulations issued thereunder have been repeatedly upheld. Amalgamated Meat Cutters & Butcher Work. v. Connally, 337 F.Supp. 737 (D.D.C. 1971); United States v. Lieb, 462 F.2d 1161, 1165 (T.E.C.A. 1972); University of Southern California v. Cost of Living Council, 472 F.2d 1065, 1070 (T.E.C.A. 1972). See also CCH Economic Controls, pp. 9054-9058.

Local 11's contention that the failure to approve the full wage provided by its contract constitutes taking of property without just compensation in violation of the Fifth Amendment lacks merit. The exercise of appropriate regulatory powers has never been held to constitute a taking which would require compensation under the Fifth Amendment. Bowles v. Willingham, 321 U.S. 503, 517-518 (1944); Legal Tender Cases, 79 U.S. (12 Wall.) 458, 551-552 (1870); Wilson v. Brown, 137 F.2d 348 (Emer.Ct.App. 1943).

In reality, Local 11 appears to be arguing that the Government has unlawfully impaired the obligation of its contract. Such argument is persuasively rejected in Amalgamated Meat Cutters v. Connally, supra, 337 F.Supp. at 763-64.

The essence of Local 11's equal protection argument is that CISC has unlawfully discriminated against the employees and in favor of the employers in disallowing the employees the full negotiated wage increase, while at the same time permitting the employers to obtain windfall profits on the basis they have considered the contractual wage increase in entering into contracts with their customers.[1] There is no evidence in the record to support a finding that any such windfall profits have been realized. 6 C.F.R. § 300.58, as originally published, required renegotiation of contracts with customers entered into after March 29, 1971, to reflect any wage cuts made by CISC. The March 29, 1971, date was deleted in an amendment to the regulation on November 23, 1972. Local 11 charges the amendment is not retroactive, while appellees claim retroactivity. We need not resolve the retroactivity issue as there is no evidence in the record to support a finding that any contractor derived windfall profit arising out of the disallowance of the wage increase in excess of $1.00.

Moreover, a fundamental basis for any argument based on equal protection is that persons who are similarly situated are treated differently under the law.

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[1]The equal protection clause of the Fourteenth Amendment by its terms applies only to states. However, the Supreme Court has held that lack of equal protection may be so discriminatory as to constitute a violation of due process. Bolling v. Sharpe, 347 U.S. 497 (1954).

Prices charged customers by contractors concern primarily the customer. The CISC and the trial court determined on the basis of substantial evidence that the wage increase allowed placed the local union employees in a favorable position compared with other electrical workers in California and with comparable laborers in the Los Angeles area.

Classifications such as involved in the instant case must be upheld if the court can perceive any rational basis for the distinctions which they draw. "It is enough that the [Government's] action be rationally based and free from invidious discrimination." Dandridge v. Williams, 397 U.S. 471, 487 (1970). The burden is upon Local 11 to show that the treatment or classification made is without rational basis or invidious in nature. Dandridge v. Williams, supra; Williamson v. Lee Optical Co., 348 U.S. 482 (1955); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). No such showing has been made in this case.

As stated in Williamson v. Lee Optical Co., supra:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.
>
> * * *
>
> "The problem of legislative classification is a perenial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Tigner v. Texas, 310 U.S. 141. Or the reform may take

> one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. Semler v. Dental Examiners, 294 U.S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. A.F. of L. v. American Sash Co., 335 U.S. 538. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. . . ." 348 U.S. 488, 489. See also Developments in the Law—Equal Protection, 82 Harv.L.Rev. 1065, 1077-87.

The classifications apparent in the instant case certainly comport with the expansive due process and equal protection standards set forth in Williamson and other similar Supreme Court cases.

The judgment is affirmed.

APPENDIX B:

Fifth Amendment to United States Constitution.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C.

Economic Stabilization Act of 1970, Section 203.

Sec. 203. Presidential authority.—(a) The President is authorized to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to—

(1) stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970, except that prices may be stabilized at levels below those prevailing on such date if it is necessary to eliminate windfall profits or if it is otherwise necessary to carry out the purposes of this title;

(2) stabilize interest rates and corporate dividends and similar transfers at levels consistent with orderly economic growth; and

(3) provide after public hearing, conducted with such notice, under such regulations and subject to such review as the exigencies of the case may, in his judgment, make appropriate for the establishment of priorities of use and for systematic allocation of supplies of petroleum products including crude oil in order to meet the essential needs of various sections of the Nation and to prevent anticompetitive effects resulting from shortages of such products.

Such orders and regulations shall provide for the making of such adjustments as may be necessary to prevent gross inequities, and shall be consistent with the standards issued pursuant to subsection (b).

(b) In carrying out the authority vested in him by subsection (a), the President shall issue standards to serve as a guide for determining levels of wages, salaries, prices, rents, interest rates, corporate divi-

dends, and similar transfers which are consistent with the purposes of this title and orderly economic growth. Such standards shall—

(1) be generally fair and equitable;

(2) provide for the making of such general exceptions and variations as are necessary to foster orderly economic growth and to prevent gross inequities, hardships, serious market disruptions, domestic shortages of raw materials, localized shortages of labor, and windfall profits;

(3) take into account changes in productivity and the cost of living, as well as such other factors consistent with the purposes of this title as are appropriate;

(4) provide for the requiring of appropriate reductions in prices and rents whenever warranted after consideration of lower costs, labor shortages, and other pertinent factors; and

(5) call for generally comparable sacrifices by business and labor as well as other segments of the economy;

(c)(1) The authority conferred on the President by this section shall not be exercised to limit the level of any wage or salary (including any insurance or other fringe benefit offered in connection with an employment contract), scheduled to take effect after November 13, 1971, to a level below that which has been agreed to in a contract which (A) related to such wage or salary, and (B) was executed prior to August 15, 1971, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

(2) The President shall promptly take such action as may be necessary to permit the payment of any

wage or salary increase (including any insurance or other fringe benefit offered in connection with an employment contract) which (A) was agreed to in an employment contract executed prior to August 15, 1971, (B) was scheduled to take effect prior to November 14, 1971, and (C) was not paid as a result of orders issued under this title, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

(3) In addition to the payment of wage and salary increases provided for under paragraphs (1) and (2), beginning on the date on which this subsection takes effect, the President shall promptly take such action as may be necessary to require the payment of any wage or salary increases (including any insurance or other fringe benefits offered in connection with employment) which have been, or in the absence of this subsection would be, withheld under the authority of this title, if the President determines that—

(A) such increases were provided for by law or contract prior to August 15, 1971; and

(B) prices have been advanced, productivity increased, taxes have been raised, appropriations have been made, or funds have otherwise been raised or provided for in order to cover such increases.

(d) Notwithstanding any other provision of this title, this title shall be implemented in such a manner that wage increases to any individual whose earnings are substandard or who is amongst the working poor shall not be limited in any manner, until such time as his earnings are no longer substandard or he is no longer a member of the working poor. The President

shall prescribe regulations defining for the purposes of this subsection, the term "substandard earnings", but in no case shall such term be defined to mean earnings less than those resulting from a wage or salary rate which yields $3.50 per hour or less.

(e) Whenever the authority of this title is implemented with respect to significant segments of the economy, the President shall require the issuance of regulations or orders providing for the stabilization of interest rates and finance charges, unless he issues a determination, accompanied by a statement or reasons, that such regulations or orders are not necessary to maintain such rates and charges at levels consonant with orderly growth.

(f) The authority conferred by this section shall not be exercised to preclude the payment of any increase in wages—

(1) required under the Fair Labor Standards Act of 1938, as amended, or effected as a result of enforcement action under such Act; or

(2) required in order to comply with wage determinations made by any agency in the executive branch of the Government pursuant to law for work (A) performed under contracts with, or to be performed with financial assistance from, the United States or the District of Columbia, or any agency or instrumentality thereof, or (B) performed by aliens who are immigrants or who have been temporarily admitted to the United States pursuant to the Immigration and Nationality Act; or

(3) paid in conjunction with exising or newly established employee incentive programs which are designed to reflect directly increases in employee productivity.

(g) For the purposes of this title, the term "wages" and "salaries" do not include reasonable contributions by any employer pursuant to a compensation adjustment for—

(1) any pension, profit sharing, or annuity and savings plan which meets the requirements of section 401(a), 404(a) (2), or 403(b) of the Internal Revenue Code of 1954;

(2) any group insurance plan; or

(3) any disability and health plan; unless the President determines that the contributions for such purposes made by any such employer are unreasonably inconsistent with the standards for wage, salary, and price increases issued under subsection (b) or under any other provision of this title. Employees in all industries subject to controls under this title shall be treated equally for purposes of this title.

(h) No State or portion thereof shall be exempted from any application of this title with respect to rents solely by virtue of the fact that it regulates rents by State or local law, regulation or policy.

(i) Rules, regulations, and orders promulgated under this title shall insofar as practicable be designed to encourage labor-management cooperation for the purpose of achieving increased productivity, and the Executive Director of the National Commission on Productivity shall when appropriate be consulted in the formulation of policies, rules, regulations, orders, and amendments under this title.

(j) Nothing in this title may be construed to authorize or require the withholding or reservation of any obligational authority provided by law or of any funds appropriated under such authority.